

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROBERT ROMANO and U.S. POSTAL SERVICE,  
POST OFFICE, Asbury Park, NJ

*Docket No. 01-2035; Submitted on the Record;  
Issued July 8, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether appellant has more than a six percent permanent impairment of his left lower extremity, for which he received a schedule award.

The Board has duly reviewed the case record in this appeal and finds that appellant has no more than a six percent permanent impairment for the loss of use of his left lower extremity.

This is the second appeal in this case.<sup>1</sup> On the first appeal, the Board reviewed the January 29 and April 13, 1998 decisions by which the Office of Workers' Compensation Programs denied appellant's claim for a schedule award on the grounds that the weight of the medical evidence established that appellant had no permanent impairment of his left lower extremity. By decision dated May 11, 2000, the Board found that the case was not in posture for decision due to an unresolved conflict in the medical opinion evidence between the Office medical adviser and appellant's treating physicians, Dr. David Weiss and Dr. Irving D. Strouse. The Board set aside the Office's January 29 and April 13, 1998 decisions and directed the Office to refer appellant to an impartial medical specialist for resolution of the conflict. The complete facts of this case are set forth in the Board's May 11, 2000 decision and are herein incorporated by reference.

By letter dated July 27, 2000, the Office referred appellant, together with the case record, a list of questions to be resolved and a statement of accepted facts, to Dr. Ian Blair Fries, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion regarding whether appellant has any permanent impairment of his left lower extremity causally related to his employment.

In his August 20, 2000 medical report, Dr. Fries provided a history of appellant's left knee injury and medical treatment. He also provided his findings on physical examination,

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<sup>1</sup> Docket No. 98-2207 (issued May 11, 2000).

which included intact sensation, normal Hallux and minor toe extension, normal ankle eversion, inversion and dorsiflexion and no response to plantar stimulation. Dr. Fries noted that there was a 4+/5 left knee extension, but flexion was equal bilaterally, supine and seated straight leg lifting was to 90 degrees bilaterally and both knees flexed to 130 degrees. Both knees were stable to stress, medial and lateral, anterior and posterior and pivot shift and Lachman tests were negative. Dr. Fries found no subpatellar crepitation, patellar apprehension or pain on palpation of the medial or lateral facets, but noted tenderness of the mid portion of the left lateral joint line and over the left Tubercle of Gerdy. The medial compartment was benign, as were the patellar tendon and tibial tubercle areas and the popliteal fossae and hamstrings. In the prone position, gluteal strength was intact bilaterally and knee flexion was equal bilaterally in range. Dr. Fries additionally noted that arthroscopic portals, medial and lateral to the patellar tendon were barely visible and nontender and there was no erythema, swelling or induration of one knee compared with the other. Mid-patellar circumferences, taken while appellant was seated with knees flexed to 90 degrees, were 39.5 centimeters on the right and 40 centimeters on the left. There was no anterior or posterior draw and a Steinman test was negative. Both thighs at 10 centimeters above the patellae were 50 centimeters in circumference, but at 15 centimeters above the patellae appellant measured 54.5 centimeters on the right and 55 centimeters on the left. Calf circumferences measured 12 centimeters below the patellae bilaterally were 38.5 on the right and 39 on the left. Based on his findings, his review of a functional capacity evaluation and the medical evidence of record, Dr. Fries diagnosed minor left knee dysfunction and postarthroscopic debridement, left knee. Dr. Fries explained his conclusions as follows:

“The A[merican] M[edical] A[ssociation], *Guides to the Evaluation of Permanent Impairment*, fourth edition, states that in evaluating a lower extremity diminished function should be estimated under only one of several areas. [Appellant] does not have limb length discrepancy (3.2a), a gait derangement (3.2b) or muscle atrophy (3.2c) or peripheral nerve injury. His left quadriceps is 0.5 centimeters larger than the right -- opposite pathology -- but within measurement error.

“On manual muscle testing, appellant has very mild weakness of the left knee on extension, but it is variable and close to normal. According to the A.M.A., *Guides*, patients whose performance is inhibited by pain or fear of pain are not good candidates for manual muscle testing. Therefore, a slight weakness such as this is prone to observer and patient inconsistencies. His range of motion (2.3e) is normal, he has no joint ankylosis (3.2f), arthritis has not been raised as an issue (3.2g), he does not have an amputation (3.2h) and none of the diagnosis-based estimates apply (3.2i).

“Assuming a muscle weakness of grade 4+/5 of left knee extension, I consider he has a two and one-half percent (2 ½ percent) whole person impairment (Table 39 page 3/77).”

By decision dated September 8, 2000, the Office found that the weight of the medical evidence rested with Dr. Fries’ opinion. Accordingly, the Office granted appellant a schedule award for a 2.5 percent impairment of the left lower extremity.

Following an oral hearing, held at appellant's request, an Office hearing representative, in a decision finalized on May 16, 2001 found that the weight of the medical evidence properly rested with Dr. Fries, the impartial medical specialist, who found a 2.5 percent impairment of the whole person. The hearing representative noted that Table 39, page 77 of the A.M.A., *Guides*, referenced by Dr. Fries, indicates that a Grade 4 muscle weakness in extension correlates to a 5 percent impairment of the whole person, which is the equivalent of a 12 percent impairment of the lower extremity. The hearing representative noted that in finding that appellant's 4+ muscle weakness equated to a 2.5 percent impairment of the whole person, Dr. Fries had accorded appellant exactly half of the impairment appellant would be entitled to if his muscle weakness were rated at Grade 4. Accordingly, the hearing representative found that a rating of exactly half of the allowable rating for Grade 4 lower extremity muscle weakness or six percent, was in keeping with Dr. Fries' findings and conclusions and modified the prior decision to reflect this correction.

In an award of compensation dated June 1, 2001, the Office granted appellant an additional 3.5 percent impairment of his left lower extremity, for a total award of 6 percent.

The schedule award provision of the Federal Employees' Compensation Act<sup>2</sup> and its implementing regulation<sup>3</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulation as the appropriate standard for evaluating schedule losses.

When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup>

The Board finds that Dr. Fries' medical report is rationalized and based on an accurate factual and medical background and constitutes the weight of the medical opinion evidence in this case. Dr. Fries fully explained why he felt muscle strength testing was the best measure of appellant's impairment, noting that appellant's slight atrophy was insignificant and within the allowances for measurement error and that the other measures, such as gait derangement or range of motion, were normal. In addition, Dr. Fries properly referenced all of the applicable portions

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<sup>2</sup> 5 U.S.C. § 8107.

<sup>3</sup> 20 C.F.R. § 10.404 (1999).

<sup>4</sup> *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

of the A.M.A., *Guides*, upon which his findings were based. The Board notes that Dr. Fries incorrectly gave his final impairment rating in terms of a whole person impairment, stating that his conclusions were based on Table 39, page 77 of the A.M.A., *Guides*.<sup>5</sup> Table 39 clearly provides the equivalent measurements for the whole person, the lower extremity and the foot, and the Office hearing representative properly converted Dr. Fries' whole person impairment rating to the lower extremity rating, to find a six percent impairment of that member. The Board notes that in doing so, the Office hearing representative did not make a medical determination or substitute his own opinion for that of a physician and that no medical issue requiring further medical advice was involved.<sup>6</sup> The Office hearing representative properly applied Table 39 of the A.M.A., *Guides*, to the medical findings of Dr. Fries. The Office properly determined that appellant was not entitled to more than a six percent permanent impairment of the left lower extremity, for which he has already received a schedule award.

The June 1 and May 16, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
July 8, 2002

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>5</sup> No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations. While the A.M.A., *Guides* provide for both impairment to the individual member and to the whole person, the Act does not provide for permanent impairment for the whole person. *John Yera*, 48 ECAB 243 (1996).

<sup>6</sup> See *Diane J. Vaccaro*, 47 ECAB 263 (1995); *Billie C. Rae*, 43 ECAB 192 (1991).